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No. 94-1908

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARGARET B. MANHARD,

Petitioner,

—v.—

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. and JOHN R. DACAMARA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court must defer to a decision of the New York Court of Appeals construing the terms of an arbitration agreement and a New York choice of law clause contained therein in accordance with general principles of contract construction under New York law?

2. Whether the Federal Arbitration Act requires enforcement of the terms of an arbitration agreement as determined by the highest court of the state whose law unequivocally applies to the construction and enforcement of the arbitration agreement?

3. Whether, assuming this Court can reach the issue, the New York Court of Appeals properly determined that the parties' contractual choice of New York law governing their arbitration agreement and its enforcement requires judicial determination of limitations defenses?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29 DISCLOSURE

All parties to the proceedings below appear in the caption of this case and, pursuant to Rule 14.1(b) of the Rules of the Supreme Court of the United States, need not be separately listed.

Pursuant to Rule 29.1, the following is a list of all parent and subsidiary corporations (except wholly owned subsidiaries) of respondent Merrill Lynch, Pierce, Fenner & Smith Inc.:

Merrill Lynch & Co., Inc.
Merrill Lynch Life Agency Inc. (Ohio)
Merrill Lynch Life Agency Inc. (Oklahoma)
Merrill Lynch Life Agency Ltd. (Mississippi)
Merrill Lynch-Nomura Management Company, Inc.
ML Life Agency Inc.

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OPINIONS BELOW

The decision of the New York Court of Appeals that gave rise to the instant petition for writ of certiorari is set forth in an opinion reported at *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manhard*, 85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308 (1995) (1-A).[1] The New York Court of Appeals rendered its decision after it granted leave to appeal from a decision and opinion of the New York Appellate Division, First Department, reported at *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manhard*, 201 A.D.2d 347, 607 N.Y.S.2d 640 (1st Dep't 1994). The opinion of the New York Supreme Court, New York County, that gave rise to the appeal to the Appellate Division was not reported.

JURISDICTION OF THIS COURT

The order and decision of the New York Court of Appeals sought to be reviewed was entered on February 21, 1995. The petition for writ of certiorari was filed on May 19, 1995, and was received by counsel for respondents on May 22, 1995. By a decision and order, dated June 7, 1995, the New York Court of Appeals denied reargument of its prior order and decision. (RA-1).

Petitioner contends that jurisdiction is conferred upon this Court by 28 U.S.C. § 1257(a). As set forth in more detail below, respondents disagree. Respondents contend that there is no federal question—that is, this case does not call into question the validity of a federal statute or the validity of a

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[1] This case was reported with a companion case entitled *Smith Barney, Harris, Upham & Co. v. Luckie*, for which a petition for certiorari has not been filed. Although the *Luckie* caption appears first in the opinion of the Court below, to avoid confusion, the opinion of the Court below will be referred to herein as the *Manhard* opinion. Citations will include the appropriate reporters and reference to the relevant pages of the appendix to the petition for certiorari. Citations to pages of respondents' appendix will contain the prefix "RA."

state statute on the grounds that it is repugnant to the laws of the United States.

REASONS FOR DENYING PETITION

This case exclusively raises a question of contract construction under New York law that has already been ruled upon by the highest court of the State of New York. As such, this matter is not appropriate for review on certiorari from a state court of last resort. Since this case presents no federal question that needs resolution by this Court, certiorari should be denied.

This case involves the construction of an arbitration agreement. The two-step analysis required herein is simple. First, the terms of the parties' agreement must be determined in accordance with general principles of contract construction under state law. Second, the terms of that agreement must be enforced under the Federal Arbitration Act. Not once in the petition for certiorari, however, does petitioner address her central demand that this Court substantively review and reverse the New York Court of Appeals' construction of the arbitration agreement under state law principles, which "this Court does not sit to review." *Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford, Jr. University*, 489 U.S. 468, 474 (1989).

Instead, petitioner avoids this fundamental issue, simply repeating the well-known presumptions and policies that favor arbitration under the FAA as if they were of talismanic significance—policies and presumptions explicitly recognized and followed by the New York Court of Appeals here. In so doing, petitioner fails to recognize that the Court of Appeals had no difficulty in interpreting the arbitration agreement herein, under applicable state law principles, to require judicial determination of limitations defenses. Under the FAA, the arbitration agreement must be enforced according to its terms, as construed by the New York Court of Appeals. *Id.*; *see First*

Options of Chicago v. Kaplan, No. 94-560, 63 U.S.L.W. 4459, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,728, 1995 WL 306184, at *4 (S. Ct. May 22, 1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1219 n.9 (1995).

Petitioner's strong reliance on this Court's recent decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995), is also misplaced. *Mastrobuono* is simply a case in which this Court reviewed a decision from the United States Court of Appeals for the Seventh Circuit that construed a different arbitration agreement under state law to resolve an entirely different issue than the one present here. Unlike in *Mastrobuono*, however, this Court should defer to the decision of the highest court of the State of New York construing the very contract in question under New York law to determine the significance of a New York choice of law clause in that agreement.

As demonstrated below, with respect to the issue presented herein—application of a New York statute, pursuant to the parties' agreement, allowing judicial resolution of limitations defenses to arbitral claims—there is no federal question. The FAA and its underlying policies simply require enforcement of the parties' agreement. *See Volt*, 489 U.S. at 479 (indeed the contrary "result would be quite inimical to the FAA's *primary purpose* of ensuring that private agreements to arbitrate are enforced according to their terms" (emphasis added)). Accordingly, respondents respectfully submit that since this case presents no federal question that needs resolution by this Court, certiorari should be denied.

I. THIS COURT SHOULD DEFER TO THE NEW YORK COURT OF APPEALS' CONSTRUCTION OF PETITIONER'S ARBITRATION AGREEMENT

This Court has repeatedly stated that arbitration agreements simply are private contracts and ordinary state law principles of contract construction apply to their interpretation. *First Options of Chicago v. Kaplan*, 1995 WL 306184, at *4 (S. Ct.

May 22, 1995); *Mastrobuono*, 115 S. Ct. at 1219 n.9; *Volt*, 489 U.S. at 474. It is similarly well-settled that this Court ordinarily does not sit to review questions of contract construction under state law, including the construction of arbitration agreements. *Volt*, 489 U.S. at 474; *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 n.9 (1981).

In this case, the New York Court of Appeals did nothing more than interpret the arbitration agreement under state law. According to the Court of Appeals:

> Although the parties broadly agreed to arbitrate "any controversy" arising from the customer agreements, that clause—like all other provisions in the contract—was subject to the parties' additional qualification that New York State law provides the basis of decision for questions concerning not only the agreement, but more critically, its enforcement. Accordingly, we conclude that under this agreement the parties agreed to refer questions of timeliness to the courts by incorporating New York law.

Manhard, 85 N.Y.2d at 202, 623 N.Y.S.2d at 805. (8-A).

Since the New York Court of Appeals found no ambiguity in the agreement, it was not obliged to construe the agreement "in favor of arbitration," a construction imposed by the FAA in the presence of an ambiguity,[2] or "against the drafter," a construction imposed by state common law in the presence of an ambiguity. *See Mastrobuono*, 115 S. Ct. at 1218-19.[3] The

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[2] Assuming, for the sake of argument, that the FAA applies in state court proceedings. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 845 (1995) (Thomas, J., dissenting) (FAA does not apply in state courts).

[3] Sitting as a federal court in a diversity action, in *Mastrobuono* this Court found that the parties' choice of law clause did not incorporate the New York rule precluding the arbitral award of punitive damages. *Id.* at 1218. According to the Court, *solely with respect to the issue of punitive damages in arbitration*, the effect of the choice of law clause, when contrasted with the arbitration clause and the fact that punitive damages

New York Court of Appeals recognized these principles and simply enforced the terms of the agreement—as required by the FAA and New York arbitration law[4]—which unequivocally require judicial determination of limitations defenses. Indeed, the New York Court of Appeals denied petitioner's reargument motion that raised arguments nearly identical to those pressed in the petition for certiorari. (RA-1).

Petitioner nonetheless argues that the New York Court of Appeals' decision herein conflicts with this Court's holding in *Mastrobuono*. In making this argument, however, petitioner sidesteps a crucial distinction between the *Mastrobuono* case and this case. In *Mastrobuono*, this Court reviewed the decision of a federal court sitting in diversity construing an arbitration contract under state law *de novo*. Here, petitioner is asking this Court to review the New York Court of Appeals' construction of an arbitration contract under New York law. Since the construction of arbitration agreements, like all other contracts, is ordinarily a question of state law, *see First Options*, 1995 WL 306184, at *4; *Mastrobuono*, 115 S. Ct. at 1219 n.4; *Volt*, 489 U.S. at 474, this Court may not do what petitioner requests.

Indeed, contrary to petitioner's arguments, this Court's decision in *Volt*, not *Mastrobuono*, is directly on point. In *Volt*, unlike in *Mastrobuono*, this Court granted certiorari from a California state appellate decision. *Volt*, 489 U.S. at 472-73. The California state court in *Volt* had interpreted a

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were allowed under New York law in non-arbitral actions, was ambiguous. *Id.* The Court reasoned that since the contract was ambiguous, and given the rule that arbitration agreements should be interpreted in favor of arbitration and against the drafter (the securities firm), the choice of New York law was not sufficient to incorporate the rule under New York law that punitive damages are not allowed in arbitration. *Id.* Clearly, these principles of contract construction are only implicated if the agreement is deemed to be ambiguous.

[4] New York's arbitration statute, which served as the model for the FAA, specifically renders arbitration agreements enforceable. *Compare* N.Y. Civ. Prac. L. & Rules 7501 [hereinafter CPLR] *with* 9 U.S.C. § 2.

contract containing a simple California choice of law clause to incorporate California arbitration law allowing a pre-arbitration stay of arbitration; such a stay would not have been authorized under the FAA in the absence of a choice of law clause in the agreement. *Id.*

In refusing to revisit the issue of contract construction in *Volt*, this Court stated that "interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Id.* at 474. Indeed, in *Mastrobuono* this Court specifically distinguished *Volt* on this ground, noting that in *Mastrobuono* it was simply reviewing "a federal court's interpretation of this contract" *after* the arbitration, and could therefore review that interpretation *de novo*. *Mastrobuono*, 115 S. Ct. at 1217 n.4.; *see id.* at 1221-23 (Thomas, J., dissenting) ("This case amounts to nothing more than a federal court applying Illinois and New York contract law to an agreement between parties in Illinois . . . . [T]he majority's interpretation of the contract represents only the understanding of a single federal court regarding the requirements imposed by state law.")

Contrary to petitioner's suggestion, nothing in *Mastrobuono* explicitly or implicitly altered this Court's decision in *Volt* on issues concerning either the primacy of state court decisions on contract construction or the preemptive effect of the FAA. Indeed, *Mastrobuono* reaffirmed this Court's prior ruling in *Volt* that, under the FAA, contracts must be enforced according to their terms, even if the terms of the contract call for application of state arbitration law. *Mastrobuono*, 115 S. Ct. at 1215 (parties may " 'specify by contract the rules under which that arbitration will be conducted' " (quoting *Volt*, 489 U.S. at 479)).

Accordingly, the New York Court of Appeals' decision below construing the agreement at issue herein to allow judicial resolution of limitations defenses pursuant to the parties' choice of New York law does not warrant review by this Court.

II. THE FAA DOES NOT PREEMPT THE PARTIES' CONTRACTUAL CHOICE OF NEW YORK LAW TO GOVERN THE ARBITRATION AGREEMENT AND ITS ENFORCEMENT

Once the terms of the agreement are determined by a court, only then may a court decide whether the application of state law in accordance with the parties' agreement undermines the goals and policies of the FAA. *Volt*, 489 U.S. at 476-77.[5] Petitioner's argument that, under the FAA, a party cannot agree to the application of state arbitration law was explicitly rejected in *Volt*, and, contrary to petitioner's contentions, was never addressed in *Mastrobuono*.

In *Volt*, this Court squarely rejected appellant's arguments that the state court's interpretation of the contract to allow application of state arbitration law pursuant to a simple choice of law clause waived a federally guaranteed right to compel arbitration or that the state court's construction of the choice of law clause violated the settled rule that agreements must be interpreted with healthy regard for the federal policy favoring arbitration, arguments similar to those made by petitioner here. *Id.* at 474-75. As this Court emphasized in *Volt*, in language relied on by the New York Court of Appeals herein, "interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration . . . simply does not offend the liberal rule of construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA." *Id.* at 476.[6]

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[5] The Court need not decide whether the FAA applies in state court because, even if it does, it does not change the result here.

[6] Moreover, petitioner incorrectly characterizes New York arbitration law in her petition for certiorari as "hostile" to arbitration. New York was the first state to require enforcement of arbitration agreements, and it was New York's arbitration statute after which the FAA was modeled. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 n.13 (1967); *Weinrott v. Carp*, 32 N.Y.2d 190, 198-99, 344 N.Y.S.2d 848, 856, 298 N.E.2d 42, 47 (1973) (the FAA "is almost identical to, and

Clearly, after *Volt*, if the terms of the arbitration agreement are free from doubt and require application of state arbitration law, or have been adjudicated as such by the highest court of the state whose law applies, then that state law must apply in order to enforce the parties' agreement according to its terms under the FAA. Any other result "would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Id.* at 479.

In *Mastrobuono*, by contrast, this Court never addressed whether enforcement of the parties' agreement to preclude the arbitral award of punitive damages would be inimical to the policies behind the FAA. This Court simply reviewed the agreement to determine whether it allowed arbitration of punitive damages demands. *Mastrobuono*, 115 S. Ct. at 1216 ("the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages").

According to the Court, the agreement at issue in *Mastrobuono*, because it was ambiguous on the issue and was drafted by the securities firm, allowed punitive damages demands to be arbitrated. *Id.* at 1218-19. Since the agreement here has been determined by the New York Court of Appeals to unambiguously require judicial resolution of limitations issues, this Court's construction of a different agreement in *Mastrobuono* is irrelevant.

Moreover, petitioner's contention that *Mastrobuono* requires application of New York statutory arbitration law only if the agreement is an "unequivocal" expression of the parties' intent that New York arbitration law apply is to no avail. First, in *Mastrobuono* this Court did not hold that a choice of law clause *must* constitute an unequivocal exclusion

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is derived from, our own arbitration statute"). The FAA contains no provision for judicial determination of limitations issues, however, because that provision was not added to the New York statute until 1959. *See* N.Y. Civ. Prac. Act § 1458-a (added by 1959 Laws c. 235).

on its face of claims or defenses from arbitration in order to render such claims non-arbitrable; *Mastrobuono* merely stated that the agreement therein, which was found to be ambiguous, was not an unequivocal exclusion from arbitration of the "important substantive right" to punitive damages claims. *Id.* at 1217-19. The "unequivocal expression" aspect of the Court's decision in *Mastrobuono* was simply one part its construction of the agreement in accordance with general common law principles of contract construction, the "more important inquiry" was the construction of the contract as a whole. *Id.* at 1217. Once again, that task has been performed by the New York Court of Appeals here and should not be disturbed.

Second, as discussed in more detail below (*see infra* Point III), under New York law, as construed by the New York Court of Appeals, the agreement here *is* an unequivocal expression of the parties' intent that at the very least, New York *statutory* arbitration law applies to allow courts to decide limitations defenses. Petitioner simply ignores the fact that *Mastrobuono* was limited solely to the question of whether that agreement incorporated New York *decisional* law precluding the arbitral award of punitive damages, which are available in court—not a statute allowing judicial determination of limitations defenses, which apply in both arbitration and in court. *Id.* at 1216.

Simply put, petitioner trumpets this Court's decision in *Mastrobuono* as if it fundamentally changed how courts should apply the FAA to arbitration agreements. Petitioner's reading of *Mastrobuono* is strained, at best. This Court has repeatedly held that the FAA simply requires enforcement of the terms of arbitration agreements, like any other contract, and that state courts have the primary authority for construing such contracts. (Indeed, that is all the explicit language of the FAA requires. *See* 9 U.S.C. § 4.) The FAA was relevant in *Mastrobuono* only to the extent the terms of the agreement were

held to be ambiguous as a matter of state law, in the absence of a state court construction of the arbitration agreement.

Here, however, the highest court of the State of New York, the preeminent authority on issues of contract construction under New York law, has held as a matter of law that there is no ambiguity in the agreement here and that the terms of the agreement require judicial resolution of limitations defenses. Failure to enforce the agreement, so construed, would therefore inhibit the policies behind the FAA.[7] Accordingly, there is nothing for this Court to decide on review and the petition for certiorari should be denied.[8]

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[7] Further, there is no FAA policy, either expressed or implied, against judicial determination of limitations defenses *if that is what the parties' agreement requires*, even if the result of the application of such defenses is that the arbitration will not go forward. *See* 9 U.S.C. §§ 1-16. Moreover, federal courts have long recognized that parties may agree to have these issues decided by courts, without abrogating the policies behind the FAA. *Hanes Corp. v. Millard*, 531 F.2d 585, 598 (D.C. Cir. 1976) (court may determine limitations issues under the FAA unless the parties' agreement clearly contemplated commitment to the arbitrators of these issues); *cf. Conticommodity Services, Inc. v. Philipp & Lion*, 613 F.2d 1222, 1224 (2d Cir. 1980) (in absence of agreement to the contrary, contractual limitations provision is for arbitrators).

[8] Thus, the issue presented by the agreement here is unlike the issue presented in *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995), in which the parties agreed to arbitrate all controversies, yet one party sought to evade the FAA by arguing that the transaction did not involve commerce and, therefore, Alabama state law that prevented enforcement of arbitration agreements applied. *Id.* at 837. *Allied-Bruce* did not involve an Alabama choice of law clause in the arbitration agreement and the applicable state law here does not render the agreement unenforceable. Here, the only proper interpretation of the choice of law clause in the parties' agreement requires arbitration of the merits of all controversies *except that limitations defenses may be decided by courts*. Judicial determination of limitations defenses therefore does not impermissibly foreclose arbitration of the merits of claims, it merely requires judicial determination of the timeliness of claims, pursuant to the parties' agreement.

III. ENFORCEMENT OF THE ARBITRATION AGREEMENT ACCORDING TO ITS TERMS REQUIRES APPLICATION OF NEW YORK LAW ALLOWING JUDICIAL RESOLUTION OF LIMITATIONS ISSUES

Even if this Court could substantively review the New York Court of Appeals' determination that the agreement requires application of New York law allowing judicial determination of limitations defenses, it must come to the same result. Specifically, with respect to contractual choice of law clauses, the New York Court of Appeals has held, prior to its decision herein, that "the parties' manifested intentions to have an agreement governed by the law of a particular jurisdiction are honored . . . it is as though the law of the selected jurisdiction were *incorporated into the agreement by reference*." *Freedman v. Chemical Constr. Corp.*, 43 N.Y.2d 260, 265 n.*, 401 N.Y.S.2d 176, 179-80 n.*, 372 N.E.2d 12, 15 n.* (1977) (emphasis added) (citing Restatement (Second) of Conflict of Laws § 187); *cf.* N.Y. Gen. Oblig. L. § 5-1401. Accordingly, the New York Court of Appeals here was correct in determining that "under this agreement the parties agreed to refer questions of timeliness to the courts by *incorporating* New York law." *Manhard*, 85 N.Y.2d. at 202, 623 N.Y.S.2d at 805 (emphasis added). (8-A). Thus, under New York law, no ambiguity can be found to exist here.

Moreover, there is no reason to distinguish an arbitration provision from any other provision in a contract; as the New York Court of Appeals properly held, as a matter of New York law, the arbitration clause—"*like all other provisions in the contract*—was subject to the parties' additional qualification that New York State law provides the basis of decision for questions concerning . . . its enforcement." *Id.* (emphasis added).[9]

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[9] Thus, unlike in *Mastrobuono*, the arbitration agreement and choice of law clause cannot be considered separately—"neither sentence intrud[ing] upon the other." *Mastrobuono*, 115 S.Ct. at 1219. As the New

Similarly, the agreement must be construed as a whole—there is no room here to interpret the choice of New York law to include only the "substantive" rules New York courts would apply *unrelated to arbitration*. Logically, a choice of law clause in an *arbitration* agreement must require application of New York *arbitration* law. *See Slatt v. Slatt*, 64 N.Y.2d 966, 967, 488 N.Y.S.2d 645, 646, 477 N.E.2d 1099, 1100 (1985) (in construing contracts, "effect must be given to the [parties'] intent as indicated by the language used"). Otherwise, *the choice of law clause would have absolutely no meaning with respect to the enforcement of the arbitration provision*, which the agreement clearly requires. There is simply no authority under New York law for a court to rewrite the terms of the parties' contract in such a manner. *Slatt v. Slatt*, 64 N.Y.2d at 967, 488 N.Y.S.2d at 646, 477 N.E.2d at 1100 (courts may not fashion new contract under guise of contract construction). Indeed, such a determination would violate the settled principle of contract construction that a contract should be interpreted to give effect to *all* of its provisions. *Weiss v. Weiss*, 52 N.Y.2d 170, 174, 436 N.Y.S.2d 862, 864, 418 N.E.2d 377, 379 (1981). Accordingly, under the plain meaning of the agreement, the New York Court of Appeals correctly held, under New York law—the law the New York Court of Appeals is charged with developing and interpreting—that New York arbitration law must govern.

In addition, because this case involves statutes of limitations, not punitive damages, this case does not implicate the concern expressed by the Court in *Mastrobuono* that the arbitration claimant unwittingly waived a right to relief that would be available under "New York law" in a non-arbitral context. In fact, the Court found the *Mastrobuono* agreement ambiguous because New York law allowed punitive damages in court, but not in arbitration, and the agreement contained

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York Court of Appeals' contract construction here illustrates, the *Manhard* choice of law clause, by its terms, "intrudes" upon the *entire* agreement, including the arbitration provision and its enforcement.

no such distinction on its face. *Mastrobuono*, 115 S. Ct. at 1217.

Here, however, there is no such potential ambiguity—New York law, like every other state's law, limits the time within which claims may be brought pursuant to express statutory limitations periods, *and these rules are applicable in both forums*. Thus, New York's statutory arbitration law (CPLR 7501-14), which affords arbitration respondents the option of having courts rather than arbitrators determine statute of limitations defenses, does not preclude arbitral determination of substantive claims, but merely authorizes judicial determination of these procedural defenses, which is routinely available in the courts.

Thus, under ordinary rules of contract interpretation, as applied by the New York Court of Appeals, no "ambiguity" arises; the New York statutory provision allowing judicial determination of limitations defenses must therefore apply to the enforcement of the arbitration agreement pursuant to the clear and unambiguous choice of law clause therein. Nothing in the *Mastrobuono* decision supports petitioner's contention that the Court of Appeals construed the agreement incorrectly.

Finally, the contract at issue here provides that the agreement "and its enforcement" is to be governed by New York law. The *Mastrobuono* contract, on the other hand, merely stated that it was to be "governed by the laws of the State of New York." *Mastrobuono*, 115 S. Ct. at 1214. In interpreting the contract here, the Court of Appeals properly placed particular emphasis on the language "and its enforcement," as illustrating the parties' intention to incorporate New York arbitration law into their agreement. *Manhard*, 85 N.Y.2d at 202, 623 N.Y.S.2d at 805. (8-A). Indeed, the Court held that "[a]lthough the parties broadly agreed to arbitrate 'any controversy' arising from the customer agreements, that clause—like all other provisions in the contract—was subject to the parties' additional qualification that New York State law provides the basis for questions concerning not only the agreement, *but more critically, its*

enforcement." *Id.* (emphasis added).[10] If anything, the *Mastrobuono* decision, by focusing on the importance of contract analysis, affirms the New York Court of Appeals' construction of the parties' agreements at issue herein and the importance placed by the New York Court of Appeals on the phrase "and its enforcement." Petitioner simply fails to explain why these words are not "critical," indeed dispositive, as found by the New York Court of Appeals.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: New York, New York
June 19, 1995

Respectfully submitted,

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[10] Petitioner's contention that the phrase "and its enforcement" could have had numerous other "meanings" begs the question. Merely reciting a laundry list of other ways in which the "and its enforcement" language may apply actually highlights petitioner's failure to distinguish the enforcement of the arbitration provision from the enforcement of any other provision of the contract. Petitioner's purported "other interpretations" are not alternative to the view that New York arbitration law applies; all of these "interpretations," including the "interpretation" that New York arbitration law applies to the enforcement of the arbitration provision, are required by the plain language of the parties' agreement.